DESTRUCTION OF EXPRESS TRUSTS BY MERGER.

The provision of Section 63 of the New York Revised Statutes prohibiting the beneficiary of a trust to receive and apply rents and profits, from assigning or disposing of his interest, was amended a few years ago by the addition of a provision to the effect that if such a beneficiary is also "entitled to a remainder" he may effect a merger of his two interests, and thus terminate the trust. A number of questions relating to the true meaning of this statute have been passed on by the lower courts, and it is the purpose of the present article to discuss one of these questions, namely, whether or not the statute, in referring to beneficiaries who are "entitled to a remainder", means literally to include all who are thus entitled, without reference to the manner in which they became so; that is, to include not only beneficiaries to whom the trust instrument gives a remainder, but also beneficiaries who have subsequently acquired, by purchase or otherwise, a remainder which the trust instrument gave not to them but to some one else. To this end it will be convenient at this point to call attention briefly to certain familiar statutes and principles of law which have a bearing on the subject.

Under the Revised Statutes, every express trust to receive and apply rents and profits, or income, effected two results. In the first place, the statute provided that

"every sale, conveyance, or other act of the trustees, in contravention of the trust, shall be absolutely void,"[1] and that "no person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable."[2]

The Real Property Law[3] contains the same provisions in slightly different form. And although they refer particularly to trusts of real property these statutes have uniformly been held applicable to personal property also, and

[1] R. S. 730, § 65. [2] 1 R. S. 730, § 63. [3] §§ 83, 85.

now the Personal Property Law[1] contains a similar provision. The result of these statutes was, that as it was impossible for either the trustee or the beneficiary to shake the property free from the trust, such a trust afforded, as was intended, a means of protecting a beneficiary against his own inexperience, poor judgment or folly, in any case where the creator of the trust did not consider it wise to trust him with the absolute disposition of the property.

The second result effected by such a trust arose out of the joint operation of the statutes above referred to, and of a different set of statutes, namely, those dealing with the suspension of the absolute power of alienation of real property and the absolute ownership of personal property. These provided in effect that such a suspension existed,

" when there are no persons in being by whom an absolute fee in possession ean be conveyed,"[2] and that " the absolute power of alienation shal not be suspended by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate,"[3]

(with one exception which, in connection with the subject here to be discussed, is immaterial). By the Real Property Law[4] these provisions were consolidated and somewhat changed in form. A similar provision applied to personal property.[5]

Under these statutes relating to real and to personal property the test of the existence of a suspension of the power of alienation, or of absolute ownership, is the same, namely, the non-existence of persons who can convey an absolute fee in possession of real estate, or transfer the absolute ownership of personal property. Such a situation might be caused, for example, by creating an express trust to receive and apply rents and profits, or income ; for in that case, as neither the trustee nor the beneficiary, nor both together, could get rid of the trust, as already stated, it followed that there were no persons in being who could convey an absolute fee of the real property, in possession, or transfer the absolute ownership of the personal property. In other words there was necessarily a suspension of the absolute power of alienation, or of absolute ownership. And

[1] § 3. [2] 1 R. S. 723, § 14. [3] 1 R. S. 723, § 15. [4] § 32.
[5] 1 R. S. 773, § 1 ; Pers. Prop. L., § 2.

as such a suspension was not allowed for more than two lives in being, every such trust, to be valid, must necessarily be confined within the limits of such a term.

To summarize what has just been stated, a trust to receive and apply rents and profits, or income, furnished, in the first place, a means of absolutely protecting a beneficiary against himself; and secondly, it effected, while it continued, a suspension of the absolute power of alienation, and therefore must be so framed as not to continue longer than during two lives in being.

Before concluding this preliminary statement, attention should also be called to two other points. It has been settled that the existence of power in the trustee to sell the particular property held by him, retaining the proceeds subject to the same trust, did not avoid the existence of a suspension, since the statutes, in referring to that subject, inalienability, were dealing not with a mere change in the form of the trust property, but with the impossibility of freeing the corpus, however constituted, from the grasp of the trust. On the other hand, if the situation was such that an absolute fee could in any way be transferred, so that both the property conveyed, and also the proceeds, were freed from the trust, there would be no suspension; and in order to attain this result it was not necessary that there should be a given person or persons capable of directly "conveying" an absolute fee, in the literal sense. It was enough that there were persons in being who could, amongst them, if they chose, whether by conveyances, releases, or otherwise, patch together a fee, with the result that by the act of all of them an absolute fee could be vested in some one, and the trust, even as to the proceeds, brought to an end[1].

Such was the condition of the law when, by L. 1893, chap. 452, the Legislature injected a novel element into the statutory scheme. This was accomplished by adding, to the section (63) of the Revised Statutes above quoted, which prohibited any assignment or disposition, by a beneficiary, of his right to receive rents and profits, a new clause permitting the beneficiary, under certain circumstances, to bring the trust to an end. Subsequently, this new provision

[1]Beardsley *v.* Hotchkiss, (1884), 96 N. Y., p. 214.

appeared in altered form in Section 83 of the Real Property Law, which now reads as follows:

"The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, cannot be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust may be transferred. Whenever a beneficiary in a trust for the receipt of the rents and profits of real property is entitled to a remainder in the whole or a part of the principal fund so held in trust subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such rents and profits, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder."[1]

It is obvious that the new provision thus introduced effects a very marked change in the general scheme of the law. Thus far, it has led to the consideration, by the courts, of several questions not bearing on the present subject of discussion.[2]

In Mills *v.* Mills,[3] however, the court had occasion to

[1] Real Prop. Law, L. 1896, Ch. 547, § 83. A similar provision is also to be found in Personal Prop. Law, L. 1897, Ch. 417, § 3.

[2] Oviatt *v.* Hopkins, (1897) 20 App. Div. 168; Butler *v.* Butler, (1899) 41 App. Div. 477; Snedeker *v.* Congdon, (1899) 41 App. Div. 433; Matter of Heinze, (1897) 20 Misc. 371; Newcomb *v.* Newcomb, (1900) 33 Misc. 191; Matter of Hogarty, (1901) 34 Misc. 610. affi'd (1901) 62 App. Div. 79; Matter of Rutherford, (1901) 36 Misc. 314; Estate of Helena Rogers, N. Y. *Law Journal*, July 22, 1902, p. 1373; Matter of Sheldon (opinion of Hon. George F. Ditmars, Surrogate, Ontario County, not reported); Matter of Seymour, (decision of Hon. Charles Hickey, Surrogate, Niagara County, not reported). The editors of the REVIEW, in an effort to ascertain whether there had been any decisions under the statute here considered, other than such as appear in the reports, addressed a letter of inquiry to all the surrogates, and received replies in nearly every instance. The only unreported cases thus discovered are the two above cited, neither of which involved the question discussed in the present article. The Sheldon case related to personal property, and turned on the applicability of the statute of 1893 to a case where the expectant estate following the trust was not validly disposed of, and accordingly passed to the beneficiary of the trust as the testator's sole next of kin; the Surrogate writes that his decision has been affirmed by the Appellate Division, without opinion. In the Seymour case, no opinion was handed down, but the Surrogate writes that the testatrix created a trust of personal property for the life of K, remainder to K's two daughters, and it was held that one of the daughters having assigned her interest to her mother, the latter thereby became entitled to effect a merger and demand one half of the principal; that the time to appeal has expired and that no appeal has been taken. Attention should also be directed to the valuable discussion, in the opinion of Edward B. Whitney, Esq., Referee, in Estate of Helena Rogers, *supra*, of the applicability of the statute where the beneficiary's interest in the income is indeterminate in amount, depending on the discretion of the trustee.

[3] (1900) 50 App. Div. 221.

pass on the question here to be considered, namely, whether a beneficiary, of a trust to receive rents and profits, or income, is entitled to effect a merger and destroy the trust, in whole or in part, if he is in any sense whatever "entitled" to an absolutely vested remainder, irrespective of whether the remainder was conferred upon him by the trust instrument or was otherwise acquired. In the Mills case, the testator devised certain lands to trustees to receive and apply the income in equal shares to the use of his widow and three daughters, and the will further provided that upon the death of either of the beneficiaries the income previously paid to the one deceased should thereafter be applied to the use of the surviving beneficiaries,

"it being my desire that the entire income from said trust fund shall be divided into as many parts or portions as there are survivors of my said wife and daughters from time to time."

The trust provision was followed by an absolute disposition of a vested remainder in fee to other persons. Apart from any operation of the amendments now under consideration, the scheme of this trust would undoubtedly be hostile to the statutory prohibition of a suspension for more than two lives in being, for it attempted to suspend the power of alienation throughout four lives. Nevertheless, the Court held that by virtue of the amendment of 1893, this trust involved no suspension whatever, and was therefore valid. The reasoning was this: that as the remaindermen could, if they chose, convey the remainder to the beneficiaries, and as the beneficiaries, having thereby become "entitled" to the remainder, could, if they chose, release their interest in the rents and profits, and thereby effect a merger and terminate the trust, it necessarily followed that there were at all times persons in being who *could* convey an absolute fee in possession, and therefore no suspension of the power of alienation existed.

The soundness of this conclusion is made by the Court to depend on the construction it gives to the word "entitled" in the statute. The statute says that a merger, and resultant destruction of the trust, may be effected where the beneficiary is also "entitled" to a remainder. As to the meaning and scope of this word, the Court, in

Mills *v.* Mills, *supra*, held that there is no limitation, in the statute,

"as to the manner in which a beneficiary may become entitled to the remainder. * * * The statute makes his power to release depend upon his ownership of the remainder, and sets no bounds to the manner of obtaining that ownership. If one buys the remainder he becomes entitled to it. * * * If he did purchase it he became entitled to it just as much as though it had been devised to him."

In discussing the opinion of the Court on this subject it is not proposed to consider the propriety of its conclusion, under the peculiar terms of the Act of 1893 on which the decision turned, but merely the question of its supposed bearing upon the proper construction of the existing statute.

It is readily perceived that if this decision represents the true construction of the present statute, it has effected an extraordinary change in the law. For it means, first, that few, if any, trusts to receive and apply rents and profits, or income, to the use of beneficiaries in being, no matter for how many lives they are intended to endure, can ever effect a suspension, if the beneficial estate in each case is immediately followed by a vested remainder to anybody, and this irrespective of whether the beneficiary does or does not in fact acquire the remainder; the fact that he might acquire it if the remainderman chose to transfer it is enough to obviate suspension of the *power* to alienate the entire estate. And if a trust may validly be constituted to continue for four lives, it is obvious that it may be constituted to continue for a thousand lives; and if a remainder vested in another, to take effect after the expiration of four lives, obviates suspension, so will a remainder vested to take effect in possession after a thousand lives. In such a case the trust would be valid because the only objection to its validity—namely, undue suspension—is absent. And if the remainderman chooses not to part with his remainder, the trust must continue throughout its allotted term.

In the second place, the theory of Mills *v.* Mills means, in the case of nearly all, if not all, of such trusts, that if the beneficiary does in fact acquire title from the remainderman, he may then destroy the trust, in whole or in part, and

come into absolute possession of a corresponding portion of the trust estate.

It certainly appears strange, that if the Legislature intended to destroy a large part of the elaborate structure which had been framed and long preserved with so much care, they should take this method of doing so. Instead of repealing or recasting anything, they leave all parts of the statute standing as before, and merely add one qualifying exception to a single section. The form adopted suggests the absence of a radical purpose of wholesale destruction, and indicates the mere introduction of a minor exception which is deemed, for special reasons, not to require the application of the general prohibition. Besides, it is not in harmony with general rules of construction to give such destructive effect to such an amendment if its language is fairly capable of a meaning which will, on the whole, fall naturally in as a new and reasonable feature (even by way of exception) of the former statute which is still in form left standing, and preserve, so far as reasonably practicable, the existing scheme. It is proper to consider, therefore, whether such a meaning is not here to be found.

Turning again, then, to the beneficiary who may effect a merger, if he is also "entitled to a remainder," it would seem equally possible, and more reasonable, to hold that the statute refers solely to a beneficiary whose title to the remainder is derived directly from the trust instrument itself. In that view, the statute would mean that where the trust instrument makes a person the beneficiary of a trust to receive and apply rents and profits, or income, and also vests him with a remainder in the whole or a part of the principal, subject only to the trust estate, then he may release his interest as beneficiary and effect a merger. The result of this would be that if a will created such a trust for the benefit of A, to continue, for example, during the whole or a part of A's life, or during the life of X or until the earlier death of A, etc., with remainder to A absolutely, the new amendment would apply; but if it created a corresponding trust for A, remainder to B, it would not apply, for even if B should convey his remainder to A, the latter, while thus "entitled" to it in a literal sense, would not be entitled in the sense intended by the statute, and so could

not take advantage of the permission to release and effect a merger. This view would, therefore, leave the general statutory scheme intact, except in cases where the testator, or grantor in trust, should choose to give the beneficiary a vested remainder.

Consideration of the reasonableness of this view of the amendment is not precluded by the proposition that it is the function of the courts to apply the law as it is, and not to make it over as they think it ought to be; for the question here under discussion is, what is the law embodied in this amendment. And on that question it is eminently proper to seek the more rational meaning of the ambiguous term employed in the statute.

First, then, the construction which applies the term "entitled to a remainder" solely to beneficiaries who are so entitled by virtue of the terms of the trust instrument, is the more reasonable because there is an apparent ground for applying it to such persons, and no apparent ground at all for applying it to others. For, although a trust to receive and apply rents and profits, or income, may be created for the benefit of any person whatever, irrespective of whether he is or is not competent to handle the principal personally, yet it is obvious that the general purpose of the revisers in perpetuating this particular form of trust was to provide a means of furnishing protection to those who for any reason, whether from infancy, imbecility, extravagance, poor judgment, mere lack of experience, or otherwise, might need to be protected against themselves.[1] Some such persons cannot even be safely trusted with the untrammeled disposition of the mere income, and others, while not fitted to manage the principal, can dispose of the income prudently without supervision. But it is to the whole general class, who for some reason and to some extent need to be protected against themselves, that the statute is primarily intended to apply. Such being its general purpose, the decision as to whether such a trust is or is not needed in the case of given beneficiaries must be left somewhere, and was, in fact, left by the statute to the creator of the trust. If he considered that a given person for whom he wished

[1] Leggett *v.* Perkins, (1849) 2 N. Y., pp. 313-314; Revisers' Notes, Rev. Stat., 2nd ed., vol. 3, p. 585.

to provide needed the form of protection furnished by the statute, he was at liberty to create for his benefit a trust of the class just described, and his judgment in this respect was not subject to review. Such was the law. Nevertheless, there were cases where the creator of the trust, in the very act of invoking the protection of the statute for a given beneficiary, coupled it with a plain declaration of his opinion that no such protection was really called for, as for example, where the same instrument which created the trust also gave to the beneficiary a vested remainder in his own right, which he could, of course, if he chose, at once sell or give away. Such a provision did not, as the law stood, in any way weaken the indissoluble nature of the trust, but it did show pretty plainly that the need of statutory protection of the beneficiary against himself was not very pressing. Under such circumstances, what could be more natural than that the Legislature should withdraw the statutory protection from such a case, and amend the statute so as to enable the beneficiary whom the testator had thus stamped as competent to handle property, to take the entire estate or funds into his own hands at once? But this reasoning has no application to the case where the creator of the trust deals with the beneficiary as beneficiary only, and does not trust him with the ownership of the remainder. This view of the amendment receives striking historical support. The Revisers themselves call attention to the general objects of a trust of this description,[1] and the statute, as originally adopted, provided only for the "education and support, or either of them, of any person." While, therefore, the trust might be created for any person, the form of the use was quite limited. The protection was afforded by prohibiting acts by either the trustee or beneficiary which should evade the intended purpose. A few months later the statute was amended to permit the creation of such trusts for the "use" (instead of mere "education and support") of the beneficiary. Thereafter, Judge Nelson[2] expressed the opinion that in so far as the beneficiaries were in fact persons not answering to the general description of those for whose benefit this class of trusts was more particularly provided

[1] Revisers' Notes, Rev. Stat., 2nd ed., vol. 3, p. 585.

[2] Coster *v.* Lorillard, (1835) 14 Wend. at pp. 330–331.

the prohibition upon their right to assign their interests was uncalled for, and that the section containing the prohibition was broader than was required.

Under such circumstances it is most natural for the Legislature now to take a middle course, and while still allowing the creation of a trust for any beneficiary the creator of the trust may select, to modify this too sweeping prohibition by providing that if the creator of the trust reposes sufficient confidence in the capacity and judgment of the beneficiary to give him a vested remainder, the protection of the statute shall in that case be removed, as being unnecessary. In this view, the Legislature has done nothing but act, along very natural lines, upon the suggestion of Judge Nelson, and has adopted, as the test of the beneficiary's competency, the testator's judgment as expressed by his giving to or withholding from the beneficiary the absolute ownership of the remainder. We have, then, the original statute and amendment; then a judicial criticism to the effect that the prohibition is too broad, being only needed for the class of beneficiaries primarily contemplated; then, finally, another amendment in line with the judicial criticism, withdrawing the prohibition in cases where the creator of the trust has himself shown that it is not needed. So much seems natural, and rational.

But the theory that this amendment has gone further, by also withdrawing the prohibition in all cases where the creator of the trust has given a vested remainder to some one other than the beneficiary, cannot be based upon any such historical explanation, nor supported by any reason whatever to justify its existence, and is, moreover, intrinsically unreasonable, and is not required by a fair reading of the amendment.

For under the construction suggested in this article, the creator of a trust, if he believes that the beneficiary needs to be protected against his own inexperience, poor judgment or folly, may still afford such protection, and at the same time may give a vested remainder, if he sees fit, to others, and this gift of a remainder will not, as it should not, endanger the indissoluble nature of the trust: while under the theory of Mills *v.* Mills, the creator of the trust cannot effect such protection at all, except by refraining

from giving the expectant estate to any one whatever, in order that there may not be any remainder to be merged, or by creating a remainder to persons whose identity must remain wholly undetermined, throughout the term of the trust, so that it will be impossible for the beneficiary to acquire title to it in any manner.

But this distinction, that a beneficiary may be protected against himself if the creator of the trust does not give a vested remainder to somebody else, and may not be thus protected if there is such remainder to somebody else, is so wholly arbitrary that it is difficult to believe that it was ever intended by the Legislature.

Furthermore, the test imposed by Mills *v.* Mills to determine whether the beneficiary of a trust followed by a vested remainder to another, may in fact destroy the trust, is equally arbitrary. It depends, in that case, on whether the beneficiary does in fact succeed in getting in the remainder. He may or may not acquire it by purchase, or by inheritance, or otherwise, but success or failure in that respect has no real bearing on the question of whether he should be protected against himself in respect to the trust estate. Under the contrary construction, however, the only test of his ability to destroy the trust is whether the creator of the trust, by giving him a vested remainder, has in effect stamped him as a person not in need of statutory protection.

And still further, the construction here suggested preserves substantially intact the established scheme of the law restricting the term of such trusts to two lives in being, while the theory of Mills *v.* Mills allows them to be framed so that they may continue through a very large number of lives, and so that they must do so if the beneficiaries do not in fact succeed in acquiring the remainder.

In this connection it is also of interest to notice that another decision[1] lends a good deal of support to the construction here contended for. It will be remembered that the amendment under consideration deals with two classes of persons, *i. e.* the beneficiary of the trust, and the person entitled to the remainder. It is when the same person answers to both of these descriptions that he may destroy the trust,

[1]Matter of Rutherford, *supra.*

in whole or in part, and effect a merger of his two interests. We have here been discussing the question of whether the person thus described as "entitled to the remainder" must be so entitled by virtue of the terms of the trust instrument, or whether it is sufficient that he subsequently becomes entitled in any manner whatever. It is clear that a similar question might be raised in respect to the person described as "beneficiary." Must he be such by virtue of the terms of the trust instrument, or is it sufficient that he becomes entitled in some other way to receive, from the trustee, income derived from the trust estate? Now this exact question was up for decision in the Rutherford case.

In that case the trust income was divided into shares for different beneficiaries, and one of these beneficiaries dying, and the will being silent as to what should in that event be done with his share of the income, it was held that it was payable, by operation of law, to the remainderman. And yet it was very naturally held that, although the same person was thus entitled to the remainder, and also to the receipt of a share of the income from the trustee, he was not a "beneficiary" of the trust, because not designated as such by the trust instrument, and that accordingly he could not effect a merger and withdraw from the trust estate the present share of principal from which his income was derived. It is true, in respect to this decision, that it might well be said that the term "beneficiary of a trust" is so specific and clear as to leave no opportunity to apply it to any one not so designated by the trust instrument, while the term "entitled to a remainder" is ambiguous, and capable, considered by itself alone, of application to the case of one who acquired the remainder by some other means. But it still remains true that such a distinction effects the absurd result of preventing the withdrawal of the fund in favor of one whom nobody ever set out to protect, while permitting such withdrawal in favor of one whom the creator of the trust sought to protect against himself; and also that the very fact that the "beneficiary" of the statute is clearly one so designated by the instrument strongly indicates the legislative intent to impose the same meaning upon its reference to the remainderman.

It only remains to call attention to one difference in phraseology between the original amendment of 1893 (under which Mills *v.* Mills was decided) and its successors, the Acts of 1896 and 1897—a difference which may in itself render the decision in the Mills case inapplicable to the present statute. The Act of 1893 extends the right to destroy the trust and effect a merger to any beneficiary of a trust to receive and apply rents and profits or income, who

"shall have heretofore become or may hereafter be or become entitled in his or her own right or through title derived as legatee, distributee or next of kin, or derived through the legal representatives of any deceased person to the remainder in the whole or any part of the principal fund so held in trust;"

while the present statutes confer such right upon a beneficiary who

"*is entitled* to a remainder in the whole or a part of the principal fund so held in trust."[1]

The meaning of the earlier statute of 1893 is extremely obscure. It is not worth while to consider in detail what one court has derisively described as its "faultless idiom." But what is clear is, that in the later acts the Legislature, while preserving the theory of allowing a merger in certain cases, has adopted an entirely new scheme of treatment, confined on the one hand to the "beneficiary" of a trust, and on the other to the person "entitled to a remainder." For the reasons above stated, it would appear that whether or not the decision in Mills *v.* Mills is justified by the phraseology of the Act of 1893, it should not be followed in construing the Acts of 1896 and 1897, which should be held to apply only where the beneficiary is by the terms of the trust instrument entitled to a remainder.

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[1] Real Prop. L. § 83; Pers. Prop, L. § 3,